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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 509

UNITED STATES OF AMERICA, PETITIONER

v.

HARRY N. BAETJER ET AL., TRUSTEES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered in the above cause on June 26, 1944, reversing the judgment of the United States District Court for Puerto Rico.

OPINIONS BELOW

Acting Judge Snyder's findings of fact, conclusions of law and judgment are printed at R. 23–26. Judge Cooper's memorandum opinion denying respondents' motion for a new trial (R. 36–37) is not reported. The opinion of the circuit court of appeals (R. 559–567) is reported in 143 F. (2d) 391.

QUESTION PRESENTED

Whether the United States is liable, in condemnation proceedings, for severance damages to sugar mill properties because of resulting economic overcapacity, where the lands actually taken are not physically contiguous to the mill properties and are not presently devoted to the same use, and the properties are not held entirely in a unified fee ownership.

STATEMENT

The United States on June 26, 1942, instituted condemnation proceedings to acquire for war purposes the fee title to two noncontiguous parcels of land (Parcels A and B) aggregating 7,936.6 acres owned by Eastern Sugar Associates on the island of Vieques (R. 1–4). Parcel B, consisting of approximately 1,700 acres, constituted the eastern 3½-mile tip of the island of Vieques and included all lands owned by respondents in that part of the island (R. 91; Defendants' Exhibit B, R. 465). Parcel A, containing approximately 6,300 acres, lies 5 or 6 miles to the west of Parcel B (R. 141) and is located in the central part of the island. It embraces all the remaining holdings of Eastern Sugar Associates on the island of Vieques except 2,500 acres situated to the west of Parcel A. Some of the remaining lands are contiguous to Parcel A, while others are isolated tracts. (See Defendants' Exhibit B, R. 465.) Simultaneously with

the institution of the condemnation proceedings, the Government filed a declaration of taking, depositing $235,460 in court as estimated compensation for the 7,936.6 acres thus taken (R. 3, 7–10).

The respondents answered, alleging that the land condemned was a part of a single integrated property known as Eastern Sugar Associates, consisting of approximately 10,500 acres of land on the Island of Vieques and 20,000 acres of land on the island of Puerto Rico; that on the entire property are located four sugar mills, an extensive railway system, docks, warehouses, etc.; and that it is devoted as an integrated whole to the raising of sugar, pasture for the raising and feeding of livestock, and the transportation and processing of sugarcane into raw sugar (R. 11–12).[1] The answer contained further allegations that the taking of the lands in question deprived respondents "of a part of Eastern Sugar Estates essential for its economical operation" (R. 12); that "due to improved methods of agriculture in recent years, the part of Eastern Sugar Estates located in Vieques has become more attractive and available as a source of cane supply" (R. 13); that as a result

[1] Vieques lies about ten miles to the east of the southeasterly corner of the island of Puerto Rico. Respondents' dock on Vieques is 17 nautical miles distant from their docking facilities on Puerto Rico and still further from their four sugar mills, all of which are located on the mainland of Puerto Rico (R. 80, 103).

of the taking "defendants have been required to break up and dispose of their herd of livestock on a forced sale basis" (R. 13); and that "the deprivation of the lands taken hereunder results in a depreciation to the said Eastern Sugar Estates, and the part thereof remaining in Vieques, in the use and value thereof, of upwards of $1,250,000" (R. 13).

The case came on for trial in November of 1942 before Acting Judge Snyder, sitting without a jury (R. 68, 168). The court heard oral testimony, received documentary evidence, saw motion pictures of (R. 156–158, 196–198) and personally viewed the property (R. 32, 157, 195–196). The evidence and the court's rulings may be briefly summarized as follows:

After listening to argument on the question whether Eastern Sugar Associates were legally entitled to severance damages for properties not contiguous to those taken, the court ruled that he would hear evidence of the nature of such damages to other properties in Vieques and on the mainland proper, subject to a later motion to strike (R. 74, 82, 83–84, 87, 92, 93, 99, 170–172, 188).

Witnesses for the respondents admitted that the growing of sugarcane on the land taken had been abandoned in 1938 (R. 76, 82–83, 89, 122, 197), and that the demand for cattle in connection with the sugar industry was waning because trucks and

tractors were replacing oxen in the cultivation and transportation of sugarcane (R. 89, 111–112, 113, 154, 175; cf. R. 331, 379). Respondents' witnesses nevertheless maintained that the Eastern Sugar Associates had suffered severance damages by reason of the Government's taking of these nonproducing cane lands on the island of Vieques. They testified that the damages (including severance) amounted to $760,650 (R. 86–94, 98); $614,498.40 (exclusive of severance, R. 117); $815,585 (R. 132); $825,507 (R. 134–135, 145, 148, 151); $1,007,000 (R. 184–186, 189, 199–201); and $964,400 (R. 225–226).[2]

In testifying as to the integrated character of the Eastern Sugar Associates' holdings, their Vice President and General Manager stated that respondents "are in the sugar business in Puerto Rico" and "their primary object is to run mills to convert the cane * * * into sugar" so that the "mills—the whole enterprise—does not lose money" (R. 185); that the taking of lands in Vieques "affected the value of the balance of the Eastern Sugar Estates—that is, the property in Puerto Rico" to the extent of $270,000 (R. 184–186).

After considering, during a week-end recess, the legal authorities submitted by the parties and

[2] This latter figure was based on special value of the property to the Eastern Sugar Associates. This witness admitted that based on the usual willing buyer and willing seller rule, the damages would amount to only $482,800 (R. 228).

the evidence which Eastern Sugar Associates had introduced as their case in chief, and in order to apprise the Government of the issues which it would have to meet, the court ruled "that the lands of the defendant located in Puerto Rico proper have not been severed in the legal sense from the lands taken by the United States in this case" (R. 242), and accordingly struck "all the evidence adduced by the defendant purporting to show that the lands of the defendant located in Puerto Rico have been damaged by virtue of the taking in this case" (R. 242). The court also ruled that the taking of the grazing and waste land on the eastern tip of the island of Vieques (Parcel B) did not affect respondents' other lands six miles to the west (R. 242). Pending consideration of additional evidence to be adduced by the parties, the court reserved its ruling on the question of respondents' claim of severance damages for the other 2,500 acres (contiguous and noncontiguous) to Parcel A (R. 242).

Witnesses for the Government denied that the property was suitable for the growing of sugar cane, pointing to the fact that the rainfall on Vieques was much lower than on Puerto Rico (R. 246–257, 297–300, 308); that the growing of sugar cane on the lands in question had been abandoned in 1938 and that every company growing cane on Vieques had been forced into reorganization proceedings at sometime or other during the past 20 years (R. 239, 301–302, 308).

These witnesses stated that the respondents had suffered no severance damages and valued the portions taken at $235,459 (R. 269); $205,000 (R. 297, 302); $271,370 (R. 323–324); $264,650.08 (R. 341) and $328,156.86 (R. 377–378).

At the conclusion of the testimony the trial judge asked that he be supplied with a transcript of the testimony as soon as it was available and requested that the parties prepare factual summaries of the evidence in support of their respective theories (R. 452). This was done. Thereafter, the trial judge filed findings of fact, conclusions of law, and judgment (R. 23–26). He concluded that "the damages the defendant, owner of said property, suffered amount to $361,500.00" and entered judgment accordingly (R. 25–26).

The respondents moved for a new trial (R. 27–30). In a brief memorandum denying this motion, Judge Cooper stated that "after careful study of the voluminous record of the trial proceedings, the oral testimony and other testimony," he was of the opinion that the judgment "is amply supported by the law and the facts, and it does not appear that any error was committed which would entitle defendant to a new trial" (R. 37).

The respondents appealed to the First Circuit. That court apparently construed Judge Snyder's ruling excluding respondents' claim for severance from property on the mainland of Puerto

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Rico as being based solely on lack of physical contiguity, and concluded that the denial of severance damages because of physical separation of the property, although by a distance of 17 miles, was erroneous as a matter of law (R. 562–566).

REASONS FOR GRANTING THE WRIT

The sugar mills of the Eastern Sugar Associates are located on the mainland of Puerto Rico, which is some 17 miles away from the land taken. (See p. 3, note 1, *supra*.) This large enterprise has scattered holdings on Vieques and on the mainland of Puerto Rico. The court below decided (R. 565) that these widely separated parcels might be deemed a single tract for severance purposes, and that, if so, there would be a compensable loss if "after the taking the appellants' mills had an uneconomic overcapacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking". (R. 565.)

1. In so holding, the court below has gone beyond anything heretofore decided by the federal courts and the overwhelming majority of the state courts in relation to severance damages. The allowance of such damages is an exception to the general rule that the Government need pay only for property actually taken. As explained in *United States* v. *Miller*, 317 U. S. 369, 375–376, "If only a portion of a single tract is taken, the

owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract." But "as respects other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages * * *." The courts have been very strict in construing what constitutes a single tract for severance purposes. Heretofore the courts have never allowed severance damages for physically separated tracts except where the parcels were separated by a street, creek, railroad right-of-way, or other similar easement. See 2 Nichols, *Eminent Domain* (2d ed., 1917), 740. The reasons are evident. The allowance of damages to disconnected tracts would add to the uncertainties of the award; would discriminate against owners of similar property who did not own any of the land taken, and would in substance constitute an award of damages for loss of business or prospective business. That the latter factor is to be excluded in an award of compensation is made clear by *Mitchell* v. *United States*, 267 U. S. 341, where the claimants were seeking to recover damages of a kind closely similar to those here in question. There the Government took land used by the plaintiffs in the business of growing and canning corn of a special grade and quality; as a result of the taking the plaintiff's canning business was destroyed, there

being no other lands in the vicinity suitable for growing corn. Compensation for such damage was held properly disallowed. In the present case respondents are in effect seeking damages caused by the taking of some lands which might be used to supply cane for their mills.

The only cases relied on by the court below with respect to the effect of lack of contiguity (*United States, ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 276, and *McCandless* v. *United States*, 298 U. S. 342, 345) presented a wholly different issue. In those cases it was pointed out that the value of the land actually taken, measured by its highest and best use, might be affected by its present or potential relationship to other land in the vicinity. In the present case the question at issue is not such measurement of the value of the land taken, but is the allowance of additional damages to the remote lands not taken.

Similar claims have been made and rejected in numerous state cases. Thus, in *City of Oakland* v. *Pacific Coast Lumber Company*, 171 Cal. 392, arising under a statute embodying the concept of severance damages as defined in the *Miller* case, *supra*, the court affirmed the trial court's disallowance of severance damages where there had been a taking of land used as dock facilities and lumber yard for an established mill business located about 400 feet from the land taken. In *Potts* v. *Railroad Co.*, 119 Pa. 278, the court af-

firmed the disallowance of recovery for damages to the defendant's marble quarry and sales yard, where non-contiguous land used by it for storing and shipping had been taken. In *State* v. *Bradshaw Land and Livestock Company,* 99 Mont. 95, the court reversed an allowance of recovery for damages to grazing lands of the defendant which were separated by a maximum of 9 miles from other grazing lands owned by it and used in its business, which were taken. See also *Matter of New York Central & H. R. Railroad Co.,* 6 Hun. 149; *Railroad* v. *Aubuchon,* 199 Mo. 352; *Fleming* v. *Chicago, D. & M. Railroad Co.,* 34 Iowa 353; cf. *Paulson* v. *State Highway Commission,* 210 Iowa 651; *Kansas City, M. & O. Railway Company* v. *Littler,* 70 Kan. 556.

2. The court below regarded the ruling of the district court as one based solely on the lack of physical contiguity between the defendants' lands. So construed, we believe, as has been indicated, that the decision of the district court should have been affirmed. But we think that the circuit court of appeals misconceived the basis of the trial court's ruling. The trial court refused to rule on the matter until after he heard all of the respondents' evidence so that he would know the precise nature of their severance claim (R. 74, 82, 83–84, 87, 92, 93, 99, 170–172, 188). That this ruling was not based solely on physical separation is further apparent from the fact that he still

reserved his ruling on the question of respondents' claim of severance damages for several small non-contiguous tracts *on Vieques,* in close proximity to parcel A (R. 242; see Defendants' Exhibit B, R. 465).

If the trial court was required, as the circuit court of appeals held, to consider unity of use even though there was no physical unity, it is submitted that the evidence offered by respondents and contained in the record was plainly inadequate to make out a case for severance damages, and that a remand for the purposes of rebuttal evidence and evidence of damage to the non-contiguous mill properties was erroneous and imposes an unwarranted burden in the trial of this type of case. The evidence shows that the land which was condemned was not at that time being used for the growing of sugar cane (R. 76, 82–83, 89, 122, 197). It was being held as a future source of supply, when better lands were no longer available on the mainland or elsewhere on Vieques (cf. R. 105). Since the use of these lands for growing cane was only prospective, severance damages for such a purpose are not allowable under the adjudicated cases. The decisions are unanimous in holding that severance damages to a non-contiguous tract may not be considered in arriving at an award where unity of use for the land taken and the land remaining is only prospective. *White* v. *West Side Elevated R. R.*

Co., 154 Ill. 620, 39 N. E. 270 (1894); *Railroad* v. *Aubuchon*, 199 Mo. 352, 97 S. W. 867 (1906); *Fleming* v. *Chicago, D. & M. Railroad Co.*, 34 Iowa 353 (1872).

The cases also make it clear that severance damages are not allowable for lands used by the condemnee in connection with those taken unless there is absolute unity of title. That is, the requisite unity of ownership for several properties does not exist if the same or different persons own different interests in different parcels. For example, in *Atlantic Coast Line R. Co.* v. *United States*, 132 F. (2d) 959 (C. C. A. 5, 1943), the railroad had placed in the hands of a wholly-owned subsidiary the title to certain lands which were being held for future expansion (p. 961). The real estate agent of the railroad contended that a taking of a portion of this land by the United States had affected the value of Atlantic Coast Line's transportation system. In holding such evidence inadmissible, the circuit court of appeals said (p. 963): "His idea of severance damage was properly rejected, for this land is not a part of the Atlantic Coast Line transportation system and has never been used by it. * * *. Severed in use and ownership from the transportation system, it cannot so affect the system as to involve legal injury to the system by its taking." Similarly, in *Glendenning* v. *Stahley*, 173 Ind. 674, 91 N. E. 234

(1910), one spouse owned the condemned tract in fee and claimed damages for a contiguous tract which was used as part of the same farm, the title of which was held by both spouses as tenants by the entirety. There being no absolute unity of title, severance damage was disallowed. See also *Tillman* v. *Lewisburg & N. R. Co.,* 133 Tenn. 554, 182 S. W. 597 (1916) (converse); *Duggan* v. *State,* 214 Iowa 230, 242 N. W. 98 (1932) ownership of one section in X, of other in X and her brother); *Potts* v. *Railroad Co.,* 119 Pa. 278, 13 Atl. 291 (1888) (one tract belonging to A, the other to A and B, partners, as tenants in common); cf. *East Bay Municipal Utility Dist.* v. *Kieffer,* 99 Cal. App. 240, 278 Pac. 476 (1929), rehearing denied, 99 Cal. App. 260, 279 Pac. 178 (1929) (condemnee owned some lands and had options for other connecting parcels). The record in the instant case shows that the respondents owned 22,000 acres and rented an additional 17,200 acres (R. 175), all the rented lands being in Puerto Rico proper (R. 190, 210). In their claim for severance they treated all these lands as part of their integrated business and claimed severance accordingly. The general manager of the company himself admitted that he was unable to allocate his alleged claim of severence among the various properties they held on the mainland and elsewhere (R. 186).

3. The question whether the Federal Government's liability in condemnation cases should be extended to include severance claims of the type here involved is an important one which should be further clarified by this Court. If the ruling below is sound, large integrated companies with disconnected holdings will in fact be obtaining, under the guise of severance damages, compensation for business losses which were denied by this Court in the *Mitchell* case, *supra*.

Such a rule would also present difficult appraisal problems. "The measure of compensation when part of a tract is taken is the difference between the fair market value of the whole before the taking and the fair market value of what remains." 2 Nichols, *Eminent Domain* (2d ed. 1917), p. 723. If separate holdings by the same owner may be considered one tract regardless of physical separation, it will be necessary for the Government, whenever it condemns a small tract belonging to a large integrated company, to undertake the valuation of that company's entire holdings. Appraisal problems will thus be made infinitely more complex, and the Government will be unable to predict in advance, with any degree of certainty, what the ultimate award will be for a particular taking for military and other purposes.

Resting as it does on a concept of just compensation in the constitutional sense, the effect

of the decision below could not be avoided by federal legislation limiting compensation to the value of the land taken in circumstances like those here disclosed.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1944.

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